

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Promoting Efficient Use of Spectrum
Through Elimination of Barriers to the
Development of Secondary Markets**

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WT Docket No. 00-230

To: The Commission

**REPLY COMMENTS OF THE
RURAL TELECOMMUNICATIONS GROUP**

THE RURAL TELECOMMUNICATIONS GROUP

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March 12, 2001

SUMMARY

The Rural Telecommunications Group (RTG) and the rest of the initial commentors unanimously support the Commission's proposal to create a secondary market in spectrum usage rights. As the Commission well knows, a consensus among so many commentors is quite rare. It reflects the pent up demand for additional spectrum and ongoing concerns with the functioning of the primary market. The Commission should therefore move rapidly to finalize this proposal even as it thinks through some of the more difficult issues that may arise when spectrum lessees and sublessees are added to the community of spectrum users. RTG agrees with Sprint Corp. that the creation of a secondary market is simply too important to delay its implementation until all potential issues are resolved.

RTG agrees with the commentors who urge the Commission not to view the creation of a secondary market as a means of covering over failures in its primary market policies. The Commission must continue to allocate more spectrum for fixed and mobile uses and do so with an eye to ensuring that its actions do not promote wastes and inefficiencies. For example, RTG and others continue to believe that established licensing areas are consistently too large to allow for licensees to provide service to their less populated areas. Coupled with these larger areas is the fact that spectrum licensees will never have an obligation to cover large parts of their geographic territories or populations. This leaves large unserved areas and populations in various radio services that rural telephone companies and spectrum entrepreneurs are ready, willing, but unable to provide service for want of access to the spectrum usage right. The Commission cannot expect that a voluntary secondary market will allow for the "trickle down" of this unused spectrum to willing users.

The most important decision the Commission will make to ensure a functioning secondary market is how it apportions the respective compliance obligations of spectrum licensees (lessors) and

spectrum lessees. If the Commission holds licensees strictly liable for the actions of independent lessees, RTG and the majority of commentators believe that a secondary market will flounder. If the Commission determines that it will follow the approach prevalent in the commercial leasing world whereby lessors are not responsible for the torts, misdemeanors and felonies committed by independent lessees, spectrum leasing will flourish.

The overwhelming majority of commentators agree with RTG that the Commission should, as a matter of policy, enforce the law and its regulations against the actual user of the spectrum, not unsuspecting licensees. Even commentators who disagree with this functional approach to compliance and enforcement urge the Commission to permit the lessor and lessee to privately determine which entity will be responsible for compliance. Other commentators suggest that the licensee must be “ultimately” responsible, but that the Commission should proceed first against the spectrum lessee. The Cellular Telecommunications and Internet Association (CTIA), for example, explains that imposing strict liability upon licensees “would discourage parties from entering into spectrum leases” in contradiction of the Commission’s goals in this proceeding. The National Telephone Cooperative Association (NTCA) states that “[t]he FCC’s approach to compliance would create a new barrier to leasing that would neither facilitate leasing nor increase the opportunities for small businesses and rural telephone companies to participate...” The Commission should take heed when two otherwise disparate organizations reach the same conclusion.

No commentator claims that, as a matter of law, the Commission cannot enforce the Communications Act of 1934 and its regulations directly against spectrum lessees. In fact, several commentators argue, as did RTG in its initial comments that the Communications Act of 1934 expressly provides for enforcement actions against non-licensees. In particular, several parties direct the

Commission to Section 2(a) of the Communications Act, which states that the law applies to “all persons” engaged in transmission of energy by radio.¹

The comments unanimously support the Commission’s proposal to radically alter its *Intermountain Microwave* test for determining whether a licensee actually controls its license in accordance with Section 310(d) of the Communications Act of 1934. The Commission cannot, however, simply replace the existing indicia demonstrating how a licensee is aware of the day-to-day operations under its license with a test that holds the licensee strictly liable for a lessee’s transgressions, whether it is aware of these actions or not. Instead, the commentors suggest several valuable alternatives to RTG’s functional approach to control that would require that the licensee make the lessee aware of its obligations and inform the Commission of the lessee’s identity. The Commission can adopt the administrative changes necessary to track a lessee’s use of spectrum with little additional cost or disruption to its existing data collection programs.

RTG agrees with the commentors who call for the continuing review of the Commission’s eligibility requirements, service rules, technology obligations and build out obligations. However, to the extent these rules exist, lessees should be required to abide by them as well when offering the same radio service in the same band. Otherwise, leasing will become a means for private parties to strip off the public interest decisions that otherwise apply to a given radio band. The Commission should work to ensure that both the licensee and lessee do not spend resources to comply with the same FCC requirements.

Several parties urge the Commission to permit Designated Entity (DE) spectrum licensees to lease their spectrum to non-designed entities. RTG agrees that DE’s should have the right to lease their spectrum to any entity that qualifies to use the spectrum, as this does not constitute a transfer of control of the license. However, since a lease constitutes a right to generate economic value from the

¹ 47 U.S.C. §152(a).

spectrum usage right, DE's should be required to pay back any auction subsidies they might have received from the government. These unjust enrichment payments will certainly be factored into the lease negotiations between DE's and non-DE's. Repayments will not foreclose such leasing as they only act to return the spectrum to its prevailing market value in that community without the government subsidy.

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